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SUPREME COURT, U. S.

IN THE

Supreme Court of the United States

OCTOBER TERM, 1948
NO. 396

CITY OF MORGANTOWN, WEST VIRGINIA,
a municipal corporation, Petitioner,

v.

ROYAL INSURANCE COMPANY, LTD., Respondent.

Upon Petition for Writ of Certiorari to the United States Circuit Court of Appeals for the Fourth Circuit.

BRIEF FOR RESPONDENT

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Upon Petition for Writ of Certiorari to the United States Circuit Court of Appeals for the Fourth Circuit.

BRIEF FOR RESPONDENT

This case involves an attempt by petitioner to appeal from an order of the District Court for the Northern District of West Virginia entered on May 3, 1948, holding that there should be a trial by the Court without a jury of the only issue presented in the case—i.e., whether an insurance policy should be reformed and corrected in its coverage so as to constitute a windstorm policy, rather than a fire insurance policy. The Circuit Court of Appeals dismissed the appeal: 169 F. (2d) 713. The Court of Appeals said petitioner's appeal was dismissible on two different grounds: (1) because the order for a non-jury trial was not, in the situation here presented, equivalent to the grant of an interlocutory injunction within the doctrine of *Enelow v. New York Life Insurance Company*, 293 U. S. 379 (1935); and (2)

because "the appeal presents no question of substance" (R. 30).

Statement of the Case.

Petitioner City of Morgantown had been carrying a windstorm insurance policy in the amount of $22,000.00 covering the hangar at the Municipal Airport. The windstorm insurance premium was 20¢ per $100.00 for a one-year term, or a total annual premium of $44.00 on the $22,000.00 policy. On March 22, 1947, the windstorm policy came up for renewal, at which time respondent's local agent issued to petitioner the policy in suit, both parties intending it merely as a renewal of the prior windstorm policy. The renewal policy of $22,000.00 was for a term of one year, commencing March 22, 1947, and carried the correct annual windstorm premium of $44.00. However, through an oversight on the part of the local agent, the premium and coverage figures in the renewal policy were inserted in the blank spaces on the policy form opposite the words "Fire and Lightning," instead of on the line opposite the words "Windstorm and Hail" as they had been on the prior policy (R. 13). The annual fire insurance premium on a $22,000.00 fire policy would have been $338.80, as contrasted with the small windstorm premium of $44.00 (R. 3). The mistake made in the coverage of the renewal policy as written is further reflected by the fact that the word "Windstorm" (not "Fire") was typed on the front of the renewal policy in the blank space provided for the entry of "Peril Covered" (R. 17).

The mistake in the writing of the renewal policy was not discovered until after a fire destroyed the hangar on August 20, 1947. There was no windstorm loss.

Mindful of the fact that, from the time of the discovery of the mistake, it might be charged with laches in seeking reformation of the policy, respondent instituted its action for reformation and correction of the policy in the District Court on October 29, 1947. Petitioner did not, either by motion or in its answer, challenge respondent's reformation action on the ground that the latter had any adequate remedy at law. Instead, petitioner responded to the action (1) by filing its answer setting up the defense that there had been no mutual mistake in the writing of the renewal policy, and that it was properly written as a fire insurance policy; and (2) by filing its counterclaim seeking judgment for $22,000.00 upon the renewal policy as a fire insurance policy. Respondent answered the counterclaim, admitting that the hangar had been destroyed by fire, but asserting that the policy in suit, upon being reformed and corrected to conform to the mutual intent and understanding of the parties, in accordance with the relief sought by respondent, would be a windstorm policy, and not a fire insurance policy. What this then left in the case for trial was aptly described by Judge Parker in the opinion of the Circuit Court of Appeals:

> "The only issue in the case is the issue of mutual mistake. If that is decided against plaintiff, defendant is entitled to recover on its policy. If it is decided in plaintiff's favor, defendant is not entitled to recover anything, since the policy in that event would not cover the loss. It seems perfectly clear that the issue is an equitable one, triable before a chancellor in equity under the old practice, and that no relief could have been afforded at law." (R. 29).

With the case in this posture, the District Court held that the trial of the reformation issue, which was the only controversy remaining in the case, either in the main action or on the counterclaim,* should be by the court without a jury. It is from such ruling that petitioner has sought to appeal.

The Questions Presented.

Respondent conceives that the questions here presented are not confined, as stated in the petition for certiorari, merely to the one issue of whether the District Court's order should be construed, in the technical sense, as an "injunction" appealable under Section 129 of the Judicial Code, 28 *U.S.C.A.* 227.** Petitioner is confronted with the further proposition that, as the Circuit Court of Appeals below said, the appeal was also dismissible "on the ground that the appeal presents no question of substance" (R. 30).

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* Petitioner's counterclaim involved no issue for measurement of damages, for the *West Virginia Code*, Chapter 33, Article 4, Section 9, fixes the recovery, if any, at the face amount of the policy when there is a total loss: "All fire insurance companies doing business in this state shall be liable, in case of total loss by fire or otherwise, as stated in the policy on any real estate insured, for the whole amount of insurance stated in the policy of insurance upon such real estate."

** In the new Federal Judicial Code, effective September 1, 1948, Section 129 is embodied as 28 *U.S.C.A.* 1292.

ARGUMENT

1.

The District Court's order for trial by the court of the equitable issue of reformation should not be interpreted as an "injunction" order appealable under the doctrine of Enelow v. New York Life Insurance Company, 293 U.S. 379 (1935) and kindred cases.

Petitioner relies upon *Enelow v. New York Life Insurance Company*, 293 U.S. 379 (1935); *Adamos v. New York Life Insurance Company*, 293 U.S. 386 (1935); and *Ettelson v. Metropolitan Life Insurance Company*, 317 U.S. 188 (1942). All of those cases followed the same procedural pattern: actions were instituted for recovery upon life insurance policies following the death of the insureds; by way of defense, the life insurance companies, relying upon alleged fraud in the applications for the policies, sought cancellation; and the District Courts ruled that the issue of fraud raised by the prayer for cancellation should be tried by the court without a jury, in advance of any trial of the actions on the policies. This Court held that, in such procedural situation, the orders directing trial of the fraud issue by the court, and postponing trial of the actions upon the policies, were equivalent to an "injunction," and therefore appealable under Section 129 of the Judicial Code.

But the present case is clearly distinguishable from those cases. At the outset, there is the fundamental distinction that, while in all the cases relied upon by petitioner the defense of the insurance companies was being predicated upon the *legal* issue of fraud, the *sole* issue here is the purely *equitable* one of reformation. Historically, reformation is a creature of equity. Suits

for reformation of written instruments were cognizable only in the equity courts. Reformation to correct a mutual mistake was never available as a defense to a law action on the written contract because of the conflict with the parol evidence rule. This Court has always observed the basic distinction between law and equity where a right to reform a written instrument for mutual mistake has been asserted. In *Union Mutual Life Insurance Company v. Mowry,* 96 U.S. 544, 547 (1878), this Court said of an insurance policy:

> "The entire engagement of the parties, with all the conditions upon which its fulfillment could be claimed, must be conclusively presumed to be there stated. If, by inadvertence or mistake, provisions other than those intended were inserted, or stipulated provisions were omitted, the parties could have had recourse for a correction of the agreement to a court of equity, which is competent to give all needful relief in such cases. But, until thus corrected, the policy must be taken as expressing the final understanding of the assured and of the insurance company."

In *Lumber Underwriters v. Rife,* 237 U.S. 605, 610 (1915), Mr. Justice Holmes used the following oft-quoted language:

> "Of course, if the insured can prove that he made a different contract from that expressed in the writing, he may have it reformed in equity. What he cannot do is to take a policy without reading it, and then, when he comes to sue at law upon the instrument, ask to have it enforced otherwise than according to its terms. The court is not at liberty to introduce a shortcut to reformation by letting the jury strike out a clause."

And compare *Northern Assurance Company v. Grand View Building Association*, 183 U.S. 308 (1902) with *Northern Assurance Company v. Grand View Building Association*, 203 U.S. 106 (1906). In the latter case, this Court sustained reformation of an insurance policy in equity after declining to permit the terms of the same policy to be reformed or varied in an earlier law action.

The Circuit Court of Appeals for the Fourth Circuit has consistently held, in cases arising from West Virginia*, that relief by way of reformation is not for the law court, but must be sought in equity with a trial by the chancellor: *Clarksburg Trust Company v. Commercial Casualty Insurance Company*, 40 F. (2d) 626 (CCA 4, 1930); *Great American Insurance Company v. Johnson*, 25 F. (2d) 847 (CCA 4, 1928).

Nor does reformation lose its equitable character, and become converted into a legal issue in the sense that a jury trial is required, merely because in recent years it has been made pleadable as an *equitable* defense in law actions, first under Section 274 (b) of the Judicial Code, 28 *U.S.C.A.* 398, and later in the one form of civil action now provided for in the Federal Rules of Civil Procedure. This Court has consistently held that an equitable defense pleadable as such under Section 274 (b) remains triable by the court without a jury, even though it is

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* The question of the proper method of trial is apparently not controlled by the rule of *Erie Railroad Company v. Tompkins*, 304 U.S. 64 (1938), but by Federal law: *Ettelson v. Metropolitan Life Insurance Company*, 137 F. (2d) 62 (CCA 3, 1943), cert. denied, 320 U.S. 777. But in any event, as pointed out in a later section of this brief, the West Virginia courts treat reformation as an equitable issue triable by the court without a jury.

invoked as a defense against a law action. The *Enelow* case, *supra,* at page 382, is itself authority for such proposition:

> "When the Congress enacted § 274 (b) of the Judicial Code, providing for equitable defenses in actions at law and the granting of affirmative equitable relief, the procedure was simplified but the substance of the authorized intervention of equity was not altered. The court was empowered to exercise a summary equitable jurisdiction. Equitable defenses were permitted to be interposed in actions at law 'by answer, plea or replication without the necessity of filing a bill on the equity side of the court'. The defendant is to have 'the same rights' as if he had filed a bill seeking the same relief. The equitable issue 'is to be tried to the judge as a chancellor'. The same order of trial is preserved as under the system of separate courts. *Liberty Oil Co. v. Condon Bank,* 260 U.S. 235, 242, 243, 67 L. Ed. 232, 234, 236, 43 S. Ct. 118. The trial of the issue at law may be postponed until the equitable issue is first disposed of, and then, if an issue at law remains, it is triable by a jury as the Seventh Amendment requires. * * *".

In *Liberty Oil Company v. Condon National Bank,* 260 U.S. 235, 242-3 (1922), this Court said:

> "Where an equitable defense is interposed to a suit at law, the equitable issue raised should first be disposed of as in a court of equity, and then, if an issue at law remains, it is triable to a jury. * * * The equitable defense makes the issue equitable, and it is to be tried to the judge as a chancellor. The right of trial by jury is preserved exactly as it was

at common law. * * * This was the practice in the courts of law and chancery in England when our Constitution and the 7th Amendment were adopted, and it is in the light of such practice that the 7th Amendment is to be construed."

And the adoption of the Federal Rules of Civil Procedure, though providing for one form of civil action, did not enlarge the right to a jury trial by requiring trial by jury of an equitable issue theretofore recognized as triable by the court: *Ettelson v. Metropolitan Life Insurance Company,* 137 F. (2d) 62, 65 (CCA 3, 1943); *Bellavance v. Plastic-Craft Novelty Company,* 30 F. Supp. 37, 39 (D.C., Mass., 1939).

Reformation is recognized as retaining its equitable character, and as the proper subject of a trial by the court without jury, even though, by virtue of modern procedural devices, it may now be asserted as a defense to a law action on the written instrument sought to be reformed, rather than in an independent equity suit for reformation: *Philippine Sugar Estates Development Company v. Philippines,* 247 U.S. 385, 388-9 (1918); *Donnelly v. Northwestern Life Insurance Company,* 59 F. (2d) 46 (CCA 5, 1932); and *Upson Nut Company v. American Shipbuilding Company,* 251 Fed. 707 (N.D., Ohio, 1918). In the *Philippines* case, *supra,* this Court said:

"The case is brought here both by writ of error and by appeal. The complaint set forth a cause of action at law on the contract. The answer was, in effect, a bill in equity for reformation, and incidentally to enjoin the action at law. * * * The proceeding became thus an equitable one. * * * The

proper method of review by this court is, therefore, by appeal; and the writ of error is dismissed."

The clear distinction between the challenge to a written instrument by a claim for its reformation based upon mutual mistake, and a challenge under the guise of "cancellation" but based upon the legal defense of fraud, was aptly pointed out by Judge Parker in the opinion of the Court of Appeals in the present case:

> "* * * The case is distinguishable, therefore, from one involving a defense that the contract is void on the ground of fraud, which under the old practice constitutes a valid defense at law without equitable relief. See *Prudential Ins. Co. v. Saxe*, App. D. C. 134 F. 2d 16. Where fraud is the defense to existing liability under a policy, a suit in equity is not available because there is an adequate remedy at law, *Phoenix Mutual Life Ins. Co. v. Bailey*, 13 Wall. 616; but this rule has no application where the policy must be reformed in equity before the insurer will be in position to assert the defense available to him under the true contract between the parties." (R. 29).

In the present case, too, respondent's action for reformation preceded any action for recovery upon the policy. Respondent would have been flirting with disaster had it waited until petitioner saw fit to sue upon the policy before the right to reformation was asserted, for a litigant seeking reformation of a written instrument for mutual mistake cannot risk delay in seeking relief after the mistake is discovered: compare *Snell v. Atlantic Fire and Marine Insurance Company*, 98 U.S. 85, 90 (1878); *American Life Insurance Company v. Stewart*, 300 U.S. 203 (1937); and 106 *A.L.R.* 1338, note.

In its argument here, petitioner urges, as a ground for a jury trial of the reformation issue, a distorted application of the principle of "adequate remedy at law". Petitioner argues that the mere fact such defense may, under present procedural rules, be pleaded defensively in an action on the policy, affords respondent an adequate remedy at law, and thereby puts reformation in the class of issues to be tried by a jury. But that was not the theory of the *Enelow* case and *Prudential Insurance Co. v. Saxe,* 134 F. (2d) 16 (D.C. App. 1943), upon which petitioner relies. In those cases, the insurer's remedy at law was pronounced adequate for an entirely different reason—i.e., because the defense of fraud there involved was historically cognizable at law, so that the legal remedy had always been entirely adequate, unless the insurer could show a cancellation suit in equity was necessary for its protection. As no special circumstances necessitating cancellation were found to exist, there was an adequate remedy at law. Petitioner ignores the fact that, as a defense to an action at law, reformation and fraud are not in the same class, and do not have the same historical background.

Even if respondent's initial action for reformation be disregarded, and the case here is viewed as if the claim for reformation was first asserted by way of defense to an action on the policy, the case stands in the following posture: there is but one issue to try in the entire litigation; that issue is whether the insurance policy should be reformed for mutual mistake; and that issue, with its historic origin in the equity courts, is universally recognized as being purely *equitable* in character. Indeed, what is there here for a jury to try? There is no legal issue to submit to a jury. Insofar as petitioner's counterclaim upon the policy is concerned,

unless and until the policy be reformed to constitute a windstorm policy, there is no defense to be heard; the impaneling of a jury would be an idle gesture, for the court would simply direct a verdict for petitioner.

The rule of appealability applied in the *Enelow* case and kindred cases has already been viewed with considerable misgiving: See *Ring v. Spina*, 166 F. (2d) 546, 548 (CCA 2, 1948); *Beaunit Mills v. Eday Fabric Sales Corporation*, 124 F. (2d) 563, 565 (CCA 2, 1942); and 55 *Harvard Law Review* 861. But however that may be, it seems clear the rule should not be further extended to apply to a case, like the present one, where the District Court, in litigation embodying no disputed legal issue, merely ordered the sole *equitable* issue to be tried by the court without a jury.

As Judge Parker said in the present case:

> "Piecemeal appeals should not be encouraged; and certainly there is no reason why they should be allowed from interlocutory orders merely because a legal counterclaim has been asserted to a suit in equity. Nothing in law or in logic nor any consideration of public policy demands any such extension of the doctrine of the *Enelow* and *Ettelson* cases. Trials ought not be delayed and appellate dockets crowded by appeals from interlocutory orders directing the course of litigation. * * *". (R. 30).

2.

No question of substance is presented by the Petition; and certiorari should not be granted.

Aside from the technical question of appealability, the dismissal of the appeal by the Circuit Court of Appeals was plainly right, since on the merits* the question sought to be presented was wholly without substance. The Court of Appeals thought so, saying:

> "And even if the order allowing** jury trial were appealable, the motion to dismiss might well be allowed on the ground that the appeal presents no question of substance." (R. 30).

It seems clear, from Judge Parker's opinion, that if the Court of Appeals had entertained petitioner's appeal, the District Court's order would have been affirmed on the merits. This Court will not grant a review if the question on which the review is sought, though in form appearing on the record, is in substance wholly without merit. In *Brolan v. United States,* 236 U.S. 216, 218 (1915), it was said:

> "* * * It behooves us in this as in all other cases to see whether the question upon which our power depends is really presented, and if not, because, although in form arising, it is in substance so wholly wanting in merit as to be frivolous, to decline the exercise of jurisdiction."

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* As was pointed out by Judge Clark in *Ring v. Spina,* 166 F. (2d) 546, 549 (CCA 2, 1948), the decision on the merits upon an appeal of this type is "inextricably intertwined with that of appealability".

** It seems obvious that the word "allowing" was inadvertently used by the court here in place of "disallowing" or "denying".

And in *United States v. Lane*, 232 U.S. 598, 600 (1914), this Court said:

> "* * * The right to review does not obtain where it is evident that the formal questions, as presented by the record, are so wanting in substance as to cause them to be frivolous and devoid of all merit."

It is submitted that petitioner's application for certiorari falls squarely within such ban, for the record reflects, as the Court of Appeals said, that the District Court's order for trial of the equitable issue of reformation without a jury was plainly right on the merits. Whether it be viewed from the standpoint of respondent's original action for reformation, or in the aspect of a defense to petitioner's counterclaim on the policy, the reformation issue did not lose its basic *equitable* character, and hence was triable by the chancellor.

Petitioner's effort to put *reformation* in the same class as the defense of *fraud* under an insurance policy is fallacious: Petitioner completely ignores the fact that the *Enelow* case, and kindred cases relied on by petitioner, all involved the issue of *fraud*, which from the earliest times has been provable as a defense to a law action on an insurance policy; and those decisions turned upon the historic availability of fraud as a legal defense. But it does not follow that because an equitable defense is now pleadable in a civil action, such defense loses its historic equitable status so as to be triable of right by a jury. It is significant that after the *Ettelson* case went back to the Circuit Court of Appeals for the Third Circuit for a decision on the merits, that Court explored, as the decisive test for or against a jury trial, the question of whether fraud was

historically available to the insurer as a legal defense to an action at law. Following such search, the Court of Appeals stated its conclusion in *Ettelson v. Metropolitan Life Insurance Company*, 137 F. (2d) 62, 65-6 (CCA 3, 1943)*:

> "* * * We find federal decisions going back for more than one hundred years in which, in suits on insurance policies, the quesiton of fraud whether consisting of conscious or innocent misstatement or nondisclosure has been tried by a jury in an action at law on the policy.
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> * * * * * * *
>
> "The issue on such a defense was tried by a jury prior to the present rules; it continues to be so triable since."

Thus, upon application of the same test, if the issue for trial in the *Ettelson* case had been reformation rather than fraud, it is clear that a trial of such issue by the court without a jury would have been approved by the Court of Appeals.

Petitioner's argument amounts to this: that as the Federal Rules of Civil Procedure provide for one form of civil action, and since reformation, though solely of equitable origin, might now be asserted as a defense in a civil action prosecuted by petitioner upon the policy, the 7th Amendment to the Constitution guarantees petitioner a jury trial of such issue. The petition for certiorari asserts "the order of the Circuit Court of Appeals * * * results in the denial of the constitutional right of jury trial on a legal claim" (Petition, p. 3).

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* Certiorari denied: 320 U.S. 777 (1943).

But when did such "constitutional right" arise? It did not arise with the 7th Amendment, for under the practice then prevailing, jury trials of reformation cases were unheard of. It did not arise from the passage of Section 274 (b) of the Judicial Code, permitting the interposing of "equitable" defenses in law actions, for any equitable issues pleaded under the statute were to be tried by the court without a jury: *Enelow v. New York Life Insurance Company; Liberty Oil Company v. Condon National Bank, supra.* Nor did the asserted "constitutional right" arise with the adoption of the new Federal Rules of Civil Procedure. The enabling Act of June 19, 1934, 48 Stat. 1064; 28 *U.S.C.A.* 723b, which initiated the movement for the new Rules, itself provided that "said rules shall neither abridge, enlarge, nor modify the substantive rights of any litigant"; and the courts are in accord that the Federal Rules were never intended either to enlarge or restrict the right to a jury trial. In *Ettelson v. Metropolitan Life Insurance Company,* 137 F. (2d) 62, 65 (CCA 3, 1943), the Court said:

> "* * * Although under the Federal Rules of Civil Procedure claims and defenses formerly cognizable either at law or equity have been merged into one action, a civil action, the rules have neither enlarged nor diminished the right to either a jury or court trial. Basic issues formerly triable as of right by a jury are still triable by a jury as a matter of right. Rule 38, 28 U.S.C.A. following section 723c. The same obtains where the right previously existed to have an issue tried by the court. * * *."

To the same effect are: *Bellavance v. Plastic-Craft Novelty Company,* 30 F. Supp. 37 (D.C., Mass., 1939); *Bynum v. Prudential Life Insurance Company,* 7 F.R.D.

585 (E.D., S.C., 1947); *Logan v. Holman,* 7 F.R.D. 596 (D.C., N.J., 1947).

While it is believed that the appropriate method for trial of the reformation issue is to be decided in accordance with Federal law, rather than West Virginia law,* it may not be amiss to point out that in the West Virginia courts, trial of a reformation issue would be had before the chancellor, and not by a jury. It is true that a West Virginia statute, embodied in *West Virginia Code,* Chapter 56, Article 5, Section 5, and quoted by petitioner, permits the pleading of certain types of equitable defenses in law actions. But even so, this would do nothing more than Section 274 (b) of the Judicial Code, in permitting the pleading of an equitable defense in a law action; and the issue itself does not lose its equitable character. In West Virginia, mutual mistake in a written instrument is correctible only by reformation in equity. In *Knowlton v. Campbell,* 48 W.Va. 294 (1900), the Syllabus of the opinion concisely states the rule as follows:

> "* * * a court of equity may, for a mistake mutual to both parties, reform the contract in a suit brought expressly to correct such mistake, and then oral evidence of any kind is admitted to establish the mistake; but this cannot be done in a court of law, which must take the contract as written."

And see *Johnston v. Terry,* 128 W.Va. 94 (1945) and *Hanley v. Harmison,* 89 W.Va. 608 (1921).

In its brief, petitioner asserts that "mistake" is pleadable as a defense at common law. This is true

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* See *Ettelson v. Metropolitan Life Insurance Company,* 137 F. (2d) 62, 64-5 (CCA 3, 1943).

as to some types of mistake, which operated at the time of the negotiations to prevent the contracting parties from reaching any agreement at all. Such a mistake is found in the classic English case of *Raffles v. Wichelhaus,* 2 H. & C. 906 (1864), where, in a contract for the sale of cotton to be carried by the ship "Peerless" from Bombay, it appeared that the contracting parties had in mind two different ships by that name sailing from Bombay, so that no effective agreement was ever reached; and in *Kyle v. Kavanagh,* 103 Mass. 356 (1869), an action at law wherein it was held that if the parties had in mind two entirely different properties when the written contract was prepared, there could be no recovery upon it. Another type of "mistake" available as a defense at law is where the parties erroneously assumed the subject matter of their agreement was still in existence: *Paxton Lumber Company v. Panther Coal Company,* 83 W.Va. 341, 352 (1919).

But to rely upon "*mutual* mistake" as a common law defense to an action on a written instrument would be to ignore completely the parol evidence rule, which the law courts enforce. This Court has repeatedly denied litigants the right to show mutual mistake in a written contract by parol evidence except in a suit for reformation in equity: *Union Mutual Life Insurance Company v. Mowry, supra; Lumber Underwriters v. Rife, supra;* and *Northern Assurance Company v. Grand View Building Association, supra.* And, as we have seen, the procedure in West Virginia is in accord: *Knowlton v. Campbell, supra.*

The rule is stated in 17 *Corpus Juris Secundum,* p. 495, as follows:

"A mistake of expression occurs where the

parties are of the same mind regarding the terms of the agreement, but the writing intended to embrace those terms does not express their true meaning. Here in courts of law the contract must stand as it is written, for it is a well settled rule of evidence in those courts that parol evidence is not admissible to contradict, add to, or vary a writing * * *. Equity may in a proper case grant relief by way of reformation * * *".

And in *New York, etc. Co. v. Preferred Underwriters*, 252 Mass. 1 (1925), the Court said:

"In the absence of an obvious mistake, a plaintiff in an action at law cannot correct by parol evidence substantial errors in the terms of a written instrument to which he and the defendants are directly or medially parties, the remedy of parties so situated being in a court of equity for reformation of the instrument."

Accordingly, respondent conceives the Circuit Court of Appeals here was clearly right in saying that "the appeal presents no question of substance". (R. 30).

For the foregoing reasons, it is respectfully submitted that petitioner's application for certiorari should be denied.

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